

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1115-FT

Cir. Ct. No. 2004CV139

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SCOTT A. HACKER AND ALYSIA M. FORSTING,

PLAINTIFFS-APPELLANTS,

V.

ADAM M. BUSH AND ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Jackson County:
GERALD W. LAABS, Judge. *Reversed and cause remanded.*

Before Vergeront, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Scott Hacker and Alysia Forsting appeal a judgment dismissing their personal injury complaint against Adam Bush and his automobile liability insurer. A jury found that Hacker's negligence caused the auto accident with Bush in which Hacker and Forsting were injured. In evidence was the fact that Hacker's urine tested positive for marijuana and PCP shortly after the accident, and testimony that these substances can cause impaired driving. The issue on appeal is whether the court erred by admitting the evidence of Hacker's drug ingestion and the effect the drugs in his system have on driving ability. We conclude that the evidence was erroneously admitted, and we reverse and remand for a new trial.

¶2 Bush struck Hacker's car as Hacker attempted a left turn. As noted, Hacker tested positive for marijuana and PCP after the accident.

¶3 At trial, Bush presented evidence that Hacker's erratic driving caused the accident. He also presented evidence of Hacker's drug test and the effect of the ingested drugs on the user. Hacker admitted that he used marijuana two days before the accident. He denied any intentional PCP use, suggesting the possibility that the marijuana was laced with PCP.

¶4 Bush's expert witness testified that marijuana and PCP could impair a driver's ability to safely drive a vehicle for up to six hours after smoking marijuana and up to fourteen hours after ingesting PCP. However, Hacker's drug test was not designed to pinpoint when the subject ingested the identified drugs, and the witness testified that Hacker could have taken the drugs as much as several days before the accident. There was evidence that after the accident Hacker exhibited increased blood pressure, an increased heart beat, and loss of memory.

Bush's expert identified those as symptoms of recent drug use but conceded that they could have resulted from Hacker's head injury, as well as for other reasons.

¶5 Over Hacker's objection, the trial court admitted the drug test results and the expert's testimony on the effects of those drugs. He contends that the trial court's decision was error and unfairly prejudiced him by influencing the jury's finding on negligent causation.

¶6 A trial court's decision to admit evidence is discretionary, and we will not overturn a discretionary decision reasonably based on accepted legal standards and the facts of record. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Whether a trial court's decision to admit or exclude evidence comports with legal principles, however, is a matter that we review de novo. *State v. Pittman*, 174 Wis. 2d 255, 275, 496 N.W.2d 74 (1993). Relevant evidence is evidence tending to make the existence of any consequential fact more or less probable than it would be without the evidence. WIS. STAT. § 904.01 (2003-04).¹ Evidence that is not relevant is inadmissible. WIS. STAT. § 904.02.

¶7 Evidence of Hacker's drug use and its effect on driving ability was not relevant evidence, absent some showing that Hacker remained under the effect of the drugs when the accident occurred. Hacker's drug test failed to provide that showing. Hacker's admission that two days previously he used marijuana, which may have been laced with PCP, also did not provide that showing because that use was well beyond the time period during which, according to the expert's undisputed testimony, those drugs would have affected his driving. The only

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

evidence of drug use within hours of the accident was certain symptoms Hacker exhibited shortly afterward, as reflected in the hospital records. However, Bush's expert testified that drug use was only one of several potential sources of those symptoms, which sources included the injuries Hacker suffered in the accident. Without testimony that it was more probable that the symptoms resulted from marijuana use than for any other reason, whether Hacker was drug impaired at the time of the accident remained purely speculative.

¶8 Bush contends that his evidence of Hacker's erratic driving allowed the inference of drug impairment. He contends, essentially, that he could use erratic driving to prove drug impairment, and drug impairment to prove erratic driving. This argument is circular. Because whether Hacker drove erratically was hotly disputed, Hacker could just as easily argue for *exclusion* because the evidence of his safe driving proved that he was *not* drug impaired.

¶9 In *State v. Schutte*, 2006 WI App 135, ¶4, ___ Wis. 2d ___, 720 N.W.2d 469, we upheld a decision admitting evidence of marijuana use to prove negligent operation of a vehicle. Bush contends that the decision in *Schutte* is controlling. However, in *Schutte* the expert testified, based on the results of the blood test taken approximately three hours after the accident, that in her opinion the defendant had smoked marijuana between 3 and 3.6 hours before the time of the blood draw, although the time could have ranged anywhere from two to six hours before the blood draw. *Id.* at ¶44. There was, in addition, Schutte's statement to others that she had used marijuana shortly before causing an accident. *Id.*, ¶10. The absence of any such evidence of recent marijuana use is the dispositive factor in the instant case.

¶10 Hacker contends that the error was prejudicial. Bush does not contend otherwise, and we therefore deem the issue conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). In any event, we have reviewed the record and conclude that the error in admitting the drug use evidence was sufficiently prejudicial to warrant reversal. In his opening statement, counsel for Bush directly attributed the accident to Hacker being “high on dope.” Counsel cross-examined Hacker concerning his drug use, introduced the expert’s testimony concerning that drug use, and argued its significance extensively in closing argument, again attributing the accident to the drug use and informing the jury “you can send a message to Scott Hacker.... You can tell him to stop doing drugs and driving cars.” The test for harmless error in civil cases is the same as in criminal cases: whether it is clear beyond a reasonable doubt that a rational jury would have reached the same result or verdict absent the error. *Hannemann v. Boyson*, 2005 WI 94, ¶¶57-58, 282 Wis. 2d 664, 698 N.W.2d 714. Here, both parties presented credible evidence attributing negligent causation to the other party. Hacker’s evidence included testimony from several eyewitnesses that directly refuted Bush’s version of the accident. Hacker’s alleged drug impairment was an integral part of Bush’s successful defense. There is reasonable doubt whether the jury would have reached the same result absent consideration of the drug use evidence. We therefore reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

